UNITED
NATIONS

A

General Assembly

Distr.
GENERAL

A/CN.9/SR.569
9 November 1995

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-eighth session

SUMMARY RECORD OF THE 569th MEETING

Held at the Vienna International Centre, Vienna,
on Wednesday, 17 May 1995, at 9.30 a.m.

Chairman: Mr. GOH (Singapore)

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V.95 59229 (E) (A/CN.9/SR.569/uncitral 2)

Distr.: 23 November 1995

The meeting was called to order at 9.35 a.m.

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW *(continued)* (A/CN.9/406, A/CN.9/407, A/CN.9/409 and Add.1-4)

Article 9 (*continued*)

1. **The CHAIRMAN** said that although there had been overwhelming support for the new version of article 9 (1) (c), there seemed to have been some misunderstanding as to the decision taken on it. He understood that when the Working Group had drafted subparagraph (c), it had intended that only essential transmittal information should be retained, but that was not clear from the present drafting, in which the words "including, but not limited to, originator, addressee(s), and date and time of transmission" had been added merely as examples.

2. **Mr. MADRID** (Spain) said that he understood it had been agreed to amend subparagraph (c), but that it had not been made clear exactly how. He wished to be sure that subparagraph (c) would be amended so as not to require the retention of all additional transmittal information, since otherwise the question would have to be reopened.

3. **The CHAIRMAN** asked whether the members of the Commission considered it necessary that all the transmittal information associated with the data message should be retained, and if not, what was the minimum transmittal information that should be kept.

4. **Mr. SORIEUL** (Secretariat) observed that the question had been discussed at length in the Working Group. The main problem was to find a formulation that would not oblige the parties to retain all the transmittal information. There had been consensus in the Working Group that the problem in electronic transmission was that too much information was generated and that information to which no legal significance was attached did not need to be retained. The formulation adopted was intended to ensure that the essential information - originator, addressee, date and time of transmission - was kept, but it had now been pointed out that some systems did not contain all that information. If the Commission did decide that all the information attached to the message had to be kept, that would be a major departure from the decision of the Working Group.

5. **Mr. CHOUKRI SBAI** (Observer for Morocco) asked whether the indications "including, but not limited to, originator, addressee(s), and date and time of transmission" would be included in the Guide.

6. **Mr. ABASCAL ZAMORA** (Mexico) reiterated his previous position and drew attention to paragraph 69 of document A/CN.9/406, the third sentence of which read:

> "In addition, it was stated that a clear distinction should be drawn between those elements of transmittal information that were important for the identification of the message and the very few elements of transmittal information (e.g., communication protocols) which were of no value with regard to the data record and which, typically, would automatically be stripped out of an incoming EDI message by the receiving computer before the data record actually entered the information system of the addressee."

(*Mr. Abascal Zamora, Mexico*)

It would be quite contrary to the reasoning which had led to the proposed wording of subparagraph (c) if it were now decided to make it obligatory to retain all the information.

7. **Mr. GRIFFITH** (Australia) considered that article 9 (2) covered the point just made by the Mexican representative.

8. As to the point made by Mr. Sorieul about the Working Group's intention, the present drafting did in fact require the retention of all transmittal information, since the Working Group had been unable to identify the particular information that should be retained: the date and time might or might not be in the transmission, and an absolute obligation to keep date and time could therefore not be imposed. However, it seemed excessive to require the retention of all information even if it was immaterial. He therefore suggested that the information be qualified as "material", with an explanatory footnote in the Guide indicating that "material information" meant details of the originator, addressee, date and time of transmission, if that information was included.

9. **Mr. SORIEUL** (Secretariat) said that the statement by the Australian representative demonstrated that the present drafting of subparagraph (c) was not satisfactory. Because the wording was "transmittal information" and not "the transmittal information" it was possible to interpret the provision as not creating the obligation to retain all the information. However, it was probably unsatisfactory to base the interpretation on such an obscure distinction.

10. One solution would be to adopt the Australian representative's suggestion. The Working Group had in fact considered the possibility of qualifying the information as "material" or "relevant". Another solution would be to maintain the text and, in response to the United States objection, make it clear that there was an obligation to retain the details of originator, addressee, date and time of transmission only if the message contained that information.

11. **Mr. BURMAN** (United States of America) suggested that since there seemed to be consensus as to what was intended, the drafting group should be asked to produce a text for the provision and that some of the necessary information might be given in the Guide.

12. The drafting group might also consider a further slight modification to article 9 (2), to change "does not enter the information system of, or designated by, the addressee" to "is not normally retained" or "is not normally retained in processing". Normally, a system edited out certain transmittal information, so that the user did not see it. In e-mail, for instance, more information than normally accompanied paper-based transmissions was provided and, as the representative of Mexico had rightly pointed out, an obligation to keep it all might not be desirable. On the other hand, many users had adopted the practice of automatically keeping that information, because it allowed an audit mechanism well beyond what was possible in paper or fax transmissions. However, paragraph (2) was intended to provide a safeguard against having to keep unnecessary information. A reference to "material" information might perhaps be included in the Guide.

13. **The CHAIRMAN** suggested that the drafting group be requested to redraft the text to make it clear that only material information such as originator, addressee, time and date of transmission should be retained, with an explanation or a footnote that whatever items appeared in the system should be included.

14. **Mr. ABASCAL ZAMORA** (Mexico) agreed with that suggestion, but stressed that the fact that there was no obligation to keep any information that was not in the system should be made clear in the Model Law itself and not in a footnote.

15. **Mr. GRIFFITH** (Australia) wondered if the drafting group had the authority to deal with what was in fact a policy issue. It might be more appropriate to set up an ad hoc group of interested delegations to consider the matter.

16. In connection with the Chairman's suggestion, he proposed the following formulation for subparagraph (c): "material transmittal information associated with the data message is retained", with a footnote or another sentence on the following lines: "Material information is constituted by information as to originator, addressee, date and time of transmission and the like which is included in the message."

17. **Mr. ANDERSEN** (Observer for Denmark) agreed with the Mexican representative that the provision should be made clear in the Law itself, not in a footnote.

18. It would be unwise to settle precisely what the transmittal information associated with the data message was, because it would vary as new systems developed. He therefore proposed that the words "transmittal information associated with the data message" should be replaced by "information necessary to reproduce how the message was transmitted".

19. **The CHAIRMAN** suggested that an ad hoc group should be set up under the coordination of the representative of Australia to produce a revised subparagraph (c) which would require retention of the necessary information to identify the data message transmitted.

20. **Mr. SORIEUL** (Secretariat), replying to a question from Mr. Griffith (Australia), confirmed that the Danish proposal was not radically different from the Working Group's concept.

21. **Mr. MADRID** (Spain) suggested that a minimum requirement be established in order to identify the form in which the message was sent. Any restrictions leaving the door open to new technology should be dealt with as far as possible in a footnote.

22. His delegation would prefer article 9 (2) to be redrafted by replacing "... information which is transmitted for communication control purposes but which does not enter the information system" by "information which cannot be stored in the information system", since the information might well enter the system but not be retained there. In that connection the proposal made by the United States representative might be worth considering.

23. **Mr. CHOUKRI SBAI** (Observer for Morocco) considered that a word such as "basic", "essential", "substantial" or "fundamental" should be used rather than the word "material", which in some languages was not very clear.

24. **The CHAIRMAN** suggested that the observer for Morocco should join the ad hoc group to work out a suitable text.

25. **Mr. BOSSA** (Uganda) suggested that since paragraph (2) was closely linked to paragraph (1) (c), the ad hoc group should consider paragraph (2) as well.

26. **Mr. BURMAN** (United States of America), replying to a question from the Chairman, agreed that his proposal on paragraph (2) should be referred to the ad hoc working group.

27. **Mr. SORIEUL** (Secretariat) drew attention to a point that should be taken up by the drafting group. The reference in article 9 (3) to "the above conditions" was not really satisfactory in a legal text and a more explicit reference to the conditions should be formulated.

Article 10

28. **Mr. SORIEUL** (Secretariat), introducing the article (A/CN.9/406, annex), said that it would be useful if the Commission differentiated in its deliberations between the principle of contractual freedom, namely the extent to which parties could agree derogations to the Model Law, and the question which had been raised previously in connection with article 5, namely whether the Model Law should contain a rule of interpretation indicating how a contract was to be interpreted in cases where the parties had not specifically decided whether to use electronic data interchange (EDI) or a writing or other paper-based technique. They were two quite separate issues.

29. **Mr. ABASCAL ZAMORA** (Mexico) said that his Government had submitted a proposal (A/CN.9/409/Add.1) to the effect that article 10 be moved from chapter III to its original position in chapter I, so that the principle of party autonomy would apply to any provisions of the Model Law that dealt with situations involving agreements concluded between parties. When the earlier decision to move article 10 to chapter III had been taken, it had not been known whether the sphere of application of the Model Law would be confined to commercial matters. Now that such a limitation had been agreed upon, it was essential, in the interests of removing barriers to trade, that the Model Law should recognize parties' contractual freedom, which was the premise of all commercial law. Otherwise any clauses appearing in EDI communication agreements and defining terms such as writing would be automatically invalidated if they differed from the definitions contained in the Model Law. Concerns had been voiced regarding protection of the rights of third parties. As he saw it, those rights would not be infringed, since the contractual agreement would be binding solely upon the parties to it.

30. **Ms. BOSS** (United States of America), agreeing with the remarks of the representative of Mexico, said that, according to prevailing practice in her country, interchange agreements contained provisions that dealt with such concepts as writing, original and evidential value within the context of the parties' relationship; those parties alone were bound by their agreement and the rights of third parties were not involved at any stage. If article 10 remained in chapter III, parties' freedom to interpret those concepts would be restricted and a situation of uncertainty would be created in the field of electronic communications.

31. **Mr. SCHNEIDER** (Germany) said that his delegation strongly supported the idea of moving article 10 back to chapter I, for the reasons given by the representatives of Mexico and the United States of America.

32. **Mr. UCHIDA** (Japan) said that, as he understood it, the provisions of chapter II were not concerned with the effects of agreements concluded between parties, but with the application of existing legal requirements in a paper-based environment that could be obstacles to trade. The purpose of chapter II was to facilitate the use of EDI, and its provisions did not constitute default rules. It was completely impossible for parties to exclude certain legal requirements from their trade by their own agreement. Article 10 should therefore remain as it stood.

33. **Mr. BONELL** (Italy) said that his delegation felt that article 10 should be moved back to form part of the General Provisions. That would broaden its scope, but would not allow parties to derogate from well-established rules relating to certain legal acts. That was outside the scope of party autonomy. It would, however, enable parties to avail themselves of the Model Law while allowing them the option of excluding the EDI-equivalent approach and applying the traditional paper-based approach. The original draft wording of article 10, when appearing as article 5 in chapter I, had allowed for the possibility of exceptions.

34. **Mr. ALLEN** (United Kingdom), agreeing with the view expressed by the representative of Japan, said that the effect of chapter II had not been altered by the limitation of the sphere of application of the draft Model Law to the commercial field. Mandatory requirements, which were intended for the protection of third parties, particularly rules of evidence, applied also in that field. The principle of contractual freedom had not been affected, however. Parties were still fully at liberty within their own contractual relationship to state whether or not a writing meant the use of a data message, but they should not be permitted to alter provisions of national law adopted for reasons of public policy. The provisions contained in chapter II should consequently not be subject to variation by agreement.

35. **Mr. GRIFFITH** (Australia), agreeing with the representatives of Japan and the United Kingdom, said that if the provisions of article 10 were made to apply to the entire Model Law, parties might mistakenly assume that they had freedom to agree to derogate from rules of law. That was not possible. Parties could, however, by reference to the provisions of chapter II, rely on the terms of the Model Law as altering what would otherwise be the applicable rules of law, since a model law could override rules of law. Moreover, allowing variations to the legal requirements contained in chapter II could affect the rights of third parties. If, at the current stage of consideration of the text, the Commission adopted the approach now being suggested, that would fundamentally change the whole concept of the Model Law. His delegation therefore strongly opposed the proposal made by the representative of Mexico.

36. **Mr. MADRID** (Spain) said that if the representative of Mexico intended that article 10 should be moved to chapter I without any textual amendment, there could be no objection, since it constituted a general provision. If, however, the intention was to extend its applicability to chapter II, problems could arise, e.g. in cases where a State amended the scope of application of the Model Law to include other fields, as provided for in article 1. Extending the applicability of article 10 to chapter II would also allow parties to modify the concepts of a writing, original, signature, etc., despite the existence of a rule of law. That could not be contemplated. The principle of party autonomy would nevertheless be applicable within the framework of the parties' own contractual relationship, provided that third parties were not involved. The parties to the contract would then have complete freedom to decide how they understood such concepts.

37. **Ms. REMSU** (Observer for Canada) said that she agreed with the view that the principle of party autonomy should not apply to chapter II. That would enable parties to evade provisions relating to minimum requirements laid down in order to ensure compliance with rules of law. It could create a situation where parties would be able to derogate from certain rules of law in a paper-based environment, but not in an electronic environment. Also, the fact that the scope of application of the draft Model Law had been confined to the commercial sphere did not alter the purpose of the provisions contained in chapter II.

38. **Mr. MÄKELÄ** (Finland) said that his delegation wished to maintain the principle of media neutrality in order not to allow parties to circumvent the mandatory rules of law contained in chapter II by electing to use electronic forms of communication. He therefore supported the view of those delegations that wished to retain article 10 as it stood.

39. **Mr. BROQVIST** (Observer for Sweden) said that his delegation fully agreed with what the representative of Finland had just said.

40. **Mr. BISCHOFF** (Observer for Switzerland) said that his delegation supported the proposal made by the representative of Mexico. Party autonomy should be established as a fundamental principle, as in the UNCITRAL Model Law on International Credit Transfers. No rule should be excluded from the benefit of contractual freedom, and the Model Law should allow parties to vary its provisions by agreement. He did not feel it necessary to establish a rule of interpretation for contracts, even for those concluded under the Model Law. That should be left to the national law governing the underlying relationship.

41. **Mr. CAPRIOLI** (France) said that he also opposed changing the scope of application of article 10 to chapter II. The article should be kept in chapter III, even though the principle of autonomy of will was a basic principle. However, the purpose of chapter II was to eliminate obstacles in terms of validity, admissibility, writing, evidence, original, signature or storage. To provide for derogation from rules of law would inevitably reduce the substantive scope of such rules, which was why his delegation opposed making any changes to the article.

42. **Mr. ABASCAL ZAMORA** (Mexico) said that it was not the case, at least in his country, that parties in commercial relations could not make agreements on such matters as evidential weight and value. In matters of trade, that procedure was preferred in Mexico, and parties could come to an agreement on evidential weight that applied exclusively in the commercial area. Placing restrictions on agreements as to evidence might cause problems in international commercial arbitration. With regard to signature, contractual freedom was very important in the banking industry; there were many instances where what had traditionally been required to be done by means of a signature was now being done by other means. The same phenomenon was occurring on the stock exchange.

43. Although the Commission was saying that it wanted to make electronic communication more accessible and to facilitate and promote it, it was actually seeking to place restrictions on electronic communications which did not at present apply to paper communications. Article 10 was very clear: agreements were valid "as between parties". As such, they could not affect the rights of third parties. An example might be the granting of credit, where it was the general rule that the transaction had to be effected in writing. The parties involved might agree, however, that they considered an electronic transfer to constitute a writing, and that agreement would then be valid between them. But obviously, if a third party wanted to bar that credit, because the operation traditionally had to be carried out in writing, its position would not be affected by the agreement between the parties, and accordingly the credit would not have been granted for that third party. While the principle of the autonomy of will was recognized, the rule of commerce was that agreements between the parties could never affect the rights of third parties.

44. The representative of Spain had mentioned the possibility that a State might wish to extend the scope of application to non-commercial areas. That would be easy enough to do if the Guide pointed out that such a State would have to take account of the fact that it would probably be necessary to restrict in some way the principle of autonomy of will.

45. **Ms. BOSS** (United States of America) said that the main problem raised by those who opposed moving article 10 was that the requirements, particularly of chapter II, were seen as mandatory under their domestic law, and to the extent that they were mandatory under that law, there was quite understandably an objection to allowing the parties to vary them by agreement. On the other hand, there were countries such as the United States and Switzerland in which the requirements of chapter II were not mandatory but could be varied by agreement under the existing law.

46. The dilemma was that if article 10 applied solely to the provisions of chapter III, the result in some countries would be that the parties would lose their present ability to vary certain requirements by agreement. That was why her delegation had supported moving the article, which would have the effect of recognizing that the provisions of chapter II in many jurisdictions were non-mandatory and that therefore the ability to vary them by agreement should be recognized. At the same time, however, she was not suggesting that in those jurisdictions where such requirements were mandatory, they should now be variable by the agreement of the parties. A compromise was possible. If the main concern was the mandatory nature of those provisions under some countries' domestic law, the matter could be dealt with by an exception — for example, article 10 could say that, except to the extent that the requirements of chapter II were mandatory under domestic law, they might be varied by agreement. That would produce the desired result whether or not article 10 was left where it was.

47. **Mr. CHOUKRI SBAI** (Observer for Morocco) said he supported previous speakers as to the desirability of retaining article 10 in its present position, since it governed contractual relationships between the originator and the addressee. If it were moved to chapter II, on the other hand, that might nullify the effect of the Model Law. The representative of Mexico had been discussing general principles of commercial law which applied in all countries, but the subject under discussion was a different matter. Under the Model Law, information presented in a data message should be given due evidential weight. Could parties amend a rule of law which governed a writing, signature or original? The purpose of the Model Law was precisely to confer upon a data message a value or weight, and to move article 10 would create both a void and an ambiguity.

48. **Mr. ANDERSEN** (Observer for Denmark) said he also wished article 10 to be kept in its present position. The representative of the United States had proposed that special exceptions be made in chapter II to make its provisions subject to variation by agreement, but that was not necessary, because articles 5, 6 and 7 were already structured in such a way that legal systems wishing to make exceptions could do so. Legal systems such as those of the United States could bracket those provisions which could be varied by agreement, while others could confine the possibility to chapter III. Even if, under the rules of chapter II, a legal system did not bracket certain provisions as exceptions, the main provisions of the chapter already took into account the fact that there might be specific contractual arrangements between parties: article 6 (1) (b) referred to "any agreement", article 7 (2) (b) to "all the relevant circumstances" and article 7 (2) to "any other relevant factor". As to article 9, however, his delegation was afraid of making it subject to variation by agreement, because it dealt with an individual's obligation towards the public to retain data messages. If it were to be possible to make exceptions to that provision by agreement, it would not be clear whether the parties should be allowed to set aside a legal obligation under administrative law.

49. **Ms. ZHANG Yuejiao** (China) said that she was in favour of keeping article 10 in its present position, as that would not affect agreement between contractual parties. The draft under discussion was a Model Law, not a mandatory law, and therefore nations could make their own arrangements in accordance with their own national legal systems. Many countries had their own mandatory regulations regarding signatures on paper documents, and keeping chapter II as now drafted would enable the application of the Model Law to be as broad as possible.

50. **Mr. SCHNEIDER** (Germany) said that if article 10 was left in its present position, it could be read as a rule which stressed, but did not restrict, party autonomy. It was not at all clear whether it applied only to the provisions of chapter III. In supporting the proposals by Mexico and the United States of America, his delegation's intention was not to make domestic rules of law open to variation by party autonomy, but rather to open the principle of equivalence or media neutrality to party autonomy. That would mean that a domestic mandatory rule of law requiring a writing, signature or original would stand and that it would be only from the principle of media neutrality that the parties could agree to depart. For example, parties could state that the contract could be revoked only in writing and not by other means, such as e-mail, fax or EDI. There was no reason why they should not be able to do so. If article 10 were left where it stood, the parties would not be able to depart from the provisions of articles 5 and 9.

51. **Mr. VRELLIS** (Observer for Greece) said he had difficulty in understanding why the representative of Mexico was proposing to move article 10. Chapter II made a data message equivalent to writing, if a writing was required by a rule of national law. It was not a question of the mandatory nature of chapter II itself, but rather of the mandatory nature of the national law which required a writing. Where such national law existed, party autonomy was already limited: for example, parties could not decide to conclude their contract orally. What, then, did party autonomy mean? Perhaps the parties might say that if they used an electronic communication, they did not want their data messages to be made equivalent to a writing. They could choose not to use electronic communication, but if they did, he did not think their autonomy would really be restricted if they were told that in certain circumstances it would be regarded as equivalent to a writing.

52. **Mr. GRANDINO RODAS** (Brazil) said that for the reasons given by other speakers, his delegation favoured keeping article 10 in its present position.

53. **Mr. GRIFFITH** (Australia) said there was another reason beyond that cited by the observer for Denmark as to why there was no difficulty with respect to chapter II in those States where it was possible to derogate by agreement from a rule of law. References in chapter II themselves began with the phrase "Where a rule of law requires ...". If the rule of law was such that it could be derogated from by agreement of the parties, leaving the article in its present position would not affect the operation of the rule of law in those States, and those few States where there was such capacity for derogation would continue to be able to exercise that capacity and would not be affected by the mandatory operation of chapter II. The principle of derogation should be left where it stood in chapter III.

54. **The CHAIRMAN** said that the majority of the Commission's members seemed to favour keeping article 10 in its present position. However, a compromise could be considered, by adding a provision to the effect that in those States where a rule of law made it possible for the parties to derogate from the provisions in question, they would be able to do so.

55. **Mr. FARIDI ARAGHI** (Islamic Republic of Iran) said that his delegation thought the article should be kept in its present position but could support the proposal made by the representative of the United States of America.

56. **Mr. BONELL** (Italy) said that he had difficulty in understanding the position of those in favour of keeping article 10 where it was, since the opponents of the Mexican proposal had themselves stressed that parties were free to agree between themselves whatever they wished. The freedom to vary by agreement only applied "as between the parties", and the provisions in chapter II expressly allowed the possibility of derogation. As the representative of Germany had pointed out, the issue was not the rules of law referred to in articles 5, 6, 7 and 8, which were unaffected by the Model Law, but the use of an electronic form of writing, signature and so forth, in addition to a paper form. He could not see why parties should not be allowed to recognize their equivalence except in specific circumstances.

57. **Mr. BURMAN** (United States of America) agreed with the representative of Italy. The reason he had brought the question up was that to place article 10 in chapter III could be interpreted as limiting the power of the State to allow the flexibility built into articles 5, 6, 7 and possibly 8, in regard to party autonomy. It might be possible to incorporate a footnote to the effect that "States may extend the right of parties as between themselves to vary the provisions of chapter II".

58. **Mr. ALLEN** (United Kingdom) said that a provision along the lines suggested by the representative of the United States was entirely unnecessary, since it could not be said that the Model Law would affect the freedom of countries to allow parties to vary existing requirements of law. Articles 5 to 8 stated that requirements must be satisfied in a particular way. If articles 5 to 7 were not applicable because they had been lawfully disapplied, they would then become irrelevant.

59. **Mr. ABASCAL ZAMORA** (Mexico) considered that it would be unwise to bring out a Model Law concerning which there had not been enough time for thorough discussion. As UNCITRAL always tried to achieve a consensus through compromise, it might be necessary to spend more time on the drafting in order to avoid ending up with an unsatisfactory text that would not attract sufficient support in the various countries. The representative of Italy had correctly summed up his own attitude that the freedom between the parties had to be preserved. The Mexican delegation had never suggested that the parties should be able to derogate from mandatory provisions. In his view, it was simply a question of finding the most suitable wording.

60. **Mr. CHAY** (Singapore) agreed with the observations made by the representative of Italy. As he understood the matter, those opposing the proposal to move article 10 did so because they thought it would allow parties to contract out of established rules of domestic law. However, he failed to see how that could happen. If, for example, the parties contracted out of article 6, they would still need to satisfy domestic law requirements in regard to the signature.

61. **Mr. HERRMANN** (Secretary of the Commission) said that the views expressed regarding the interpretation of article 10 were much closer than would appear. The main problem seemed to concern the question of mandatory rules. As he understood it, the mandatory element referred to the minimum requirement. Parties could agree on stricter rules if they wished. On the subject of evidential value, in some countries the relevant provisions were non-mandatory, in others a matter of public policy, and in still others somewhere between. At all events, the Model Law could not change the mandatory character of domestic rules. In his view, the term "rule of law" would include non-mandatory provisions that had not been

(*Mr. Herrmann, Secretary of the Commission*)

derogated from and thus became mandatory. The Model Law offered a positive interpretation by allowing other means, providing certain conditions were met. Party autonomy must be subject to certain safeguards; an oral agreement could not be allowed, for example, but an agreement between the parties regarding certain details relating to EDI messages could be accepted. If delegates had different interpretations of what was intended, it might be necessary to clarify article 10 by means of a footnote or a comment in the Guide, but he thought that UNCITRAL should not get into the habit of using footnotes too often.

The meeting was suspended at 11.50 a.m. and resumed at 12.15 p.m.

62. **The CHAIRMAN** said that most representatives seemed to take the view that article 10 should remain where it was. He reminded the Commission that it had agreed not to alter decisions arrived at in the Working Group unless there was overwhelming support for a change. It appeared that those opposing the Mexican proposal were not against domestic legislation allowing party autonomy in regard to the provisions contained in chapter II. In response to the concern expressed by the representative of the United States that leaving article 10 where it was might be interpreted as meaning that the parties could not by agreement vary articles 6, 7 and 8, he suggested that a possible solution might be to add a new paragraph (2) to article 10 formulated as follows: "Nothing in this article shall be construed as preventing any variation of other rules as permitted under national law", or other wording to that effect.

63. **Mr. BONELL** (Italy) said he was entirely in agreement with the Secretary. He would accordingly suggest that article 10 be deleted as being unnecessary. In substance, both chapter II and chapter III already contained the possibility, where appropriate, of a different agreement between the parties, and where no such provision existed, it could be assumed that the parties could not derogate from the article concerned unless domestic law provided otherwise. In his view, whether article 10 were included or excluded, placed in its present position or elsewhere, would not change the situation in substance.

64. **Mr. ANDERSEN** (Observer for Denmark) proposed that it should be left to the Secretariat to reflect the consensus in the Commission in the Guide to the Model Law. As he understood it, the consensus reached was to the effect that variation by agreement could apply to certain aspects of certain provisions in chapter II. Regarding the proposal put forward by the representative of Italy, it was true that article 10 was redundant in relation to chapter III as well as to certain provisions of chapter II. But, from a structural point of view, such redundancy had become the style of the Model Law. It could, for example, be found also in article 4, in which a principle was stated that was subsequently established in following provisions. In his view, however, it was important to tell the reader of the Model Law that interchange agreements were needed when dealing with EDI.

65. **Mr. ABASCAL ZAMORA** (Mexico) said that there was a basic consensus in the Commission to the effect that party autonomy could be permitted so long as the contractual agreements did not infringe mandatory provisions. He suggested that the drafting group be asked to give effect, either by relocating the article or adding some new text, to that consensus, which should be clearly expressed in the law itself, not in the Guide or in a footnote.

66. **Mr. BURMAN** (United States of America) expressed his support for the Danish proposal and his opposition to the deletion of article 10, which would amount to a fundamental change.

67. **The CHAIRMAN** said that there were three proposals before the Commission. The first, by the representative of Italy, was to delete article 10 entirely, it being understood that, if that proposal was adopted, some consequential changes might be necessary to other articles in chapter III. The second, by the observer for Denmark, was to state in the Guide the consensus reached by the Commission in regard to article 10, which would remain as it was. The third, suggested by the representative of Mexico, was to ask the drafting group to see that article 10 reflected the consensus reached during the present discussion.

68. **Mr. ALLEN** (United Kingdom) said that the implications of the Danish proposal were unclear. The observer for Denmark had not explained what he thought the consensus reached by the Commission actually was.

69. **The CHAIRMAN** said that, according to the Danish proposal, article 10 would remain as it was and that the Guide would state that the parties to an agreement had autonomy to change the provisions in chapter II in so far as domestic legislation allowed them to do so.

70. **Mr. GRIFFITH** (Australia) considered the third option to be impossible. The drafting group could not be asked to resolve issues that the Commission had been unable to resolve itself. The Commission itself would have to deal with them.

71. **Mr. BONELL** (Italy) said he still found it difficult to understand the second option. In his view, the consensus in the Commission was that parties could derogate here and there from what was stated in the Model Law, which was intended to allow electronic means to be used for certain documents traditionally in paper-based forms. The Secretary had been right to assert that the differences in substance were not great, but if everything were referred to domestic law, the parties might even be allowed to exclude a rule of law imposing an agreement in writing. That would be unacceptable. As he saw it, the Commission was trying to come up with a uniform law in the form of a Model Law.

The meeting rose at 12.35 p.m.